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BULK SALES LAWS: A STUDY IN STATUTORY INTERPRETATION†

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KINGSLEY R. SMITH**

This article is the second of a series which proposes to deal with several aspects of bulk sales legislation. The first paper, entitled "Bulk Sales Laws; A Study in Economic Adjustment" appeared in the November, 1928 issue of the University of Pennsylvania Law Review.¹ That discussion considered three phases of the bulk sales problem: (1) the inability of the American statutory successors of 13 Elizabeth to meet the legal needs of the creditor class when a defrauding merchant sold out in bulk his stock of unpaid for goods to a *bona fide* purchaser for value; (2) the campaign waged by the National Association of Credit Men to place bulk sales laws on the statute books of the forty-eight states; (3) the unfavorable attitude of at least five state supreme courts toward bulk sales laws which resulted (a) in these statutes being declared unconstitutional in the states in question and (b) in certain changes being made in the unconstitutional statutes in order to meet the objections raised by the courts.

This paper proposes to take up the story where the earlier one left off. It will consider, first, the reaction of certain outstanding credit men of the present generation to these statutes, some of which have been in force in their respective states for more than thirty years, and, second, the reaction of the courts in interpreting and applying certain provisions of these statutes. In other words, just as the former article treated the past history of bulk sales laws, so this one will consider the present status of such laws from the viewpoint of both credit men and courts. Whatever personal reactions the authors may have toward these laws and the construction placed upon them, and whatever suggestions they may have in the direction of statutory changes will be reserved for a later paper. This later paper also will cover certain phases of statutory interpretation not considered herein.

† The authors desire to express their appreciation to Melba Stucky Billig, Esq. of the Pennsylvania Bar for her editorial criticism of this paper. They wish to acknowledge their indebtedness to the several publications of W. Randolph Montgomery, Esq. of the New York Bar, counsel to the National Association of Credit Men, for many suggestions contained herein; also to the various credit men who responded so generously to requests for information and opinion.

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¹ (1928) 77 U. PA. L. REV. 72.

BULK SALES LAWS

Even at the risk of repeating a part of the former article, something should be said at the outset concerning the purpose of a bulk sales law and the various forms which such a statute may take. As already suggested, the bulk sales law was aimed at giving an unsecured, unpaid creditor of a merchant a remedy (in addition to any remedy he possessed either at common law or under such a statute as 13 Elizabeth) against a defendant who had purchased in bulk the stock of the merchant without putting the merchant's creditors on notice.² In order to meet this situation three general types of bulk sales statutes have been evolved. (1) Thirty-three jurisdictions³ have modelled their bulk sales laws upon what has been described as the "New York form".⁴ (2) Twelve states⁵ have fashioned their bulk sales en-

² For a description of the wide use of such practices, see *ibid.* 75-81. A discussion of the specific remedies open to creditors under bulk sales statutes will be reserved until the future paper previously mentioned.

³ ALA. CODE ANN. (Michie, 1928) §§ 8041-8045; ARK. DIG. STAT. (Supp. (1927) §§ 4870-4872; COLO. COMP. LAWS (1922) §§ 3756-3758; DEL. REV. CODE (1915) § 2638; ILL. REV. STAT. (Smith & Hurd, 1929) 2566; IND. ANN. STAT. (Burns, 1926) §§ 8025-8054; IOWA CODE (1927) §§ 10008-10012; KAN. REV. STAT. ANN. (1923) c. 58, §§ 101-104; ME. REV. STAT. (1916) c. 114, § 6; MASS. GEN. LAWS (1921) c. 106, §§ 1, 2; 2 MICH. COMP. LAWS (Cahill, 1915) §§ 6346-6348; MINN. GEN. STAT. (1923) §§ 8473-8474; MISS. CODE (1930) §§ 3353-3356; MO. REV. STAT. (1919) §§ 2286-2290; NEB. COMP. STAT. (1922) 2561-2562; N. H. PUB. LAWS (1926) 840; N. J. COMP. STAT. (Cum. Supp. 1924) §§ 180-182; N. M. STAT. (Courtright, 1929), c. 119, §§ 101-103; N. Y. CONS. LAWS (Cahill, 1923) c. 42, §§ 44; N. C. CODE ANN. (Michie, 1927) § 1013; 1 N. D. COMP. LAWS ANN. (1913) §§ 7224-7227; OHIO GEN. CODE (Page, 1926) §§ 11, 102-11, 103-1; 2 OKLA. COMP. STAT. (1921) §§ 6027-6030; R. I. GEN. LAWS (1923) §§ 4503-4504; 3 S. C. CODE OF LAWS (1922) §§ 3527-3529; S. D. COMP. LAWS (1929) §§ 914-921; TENN. ANN. CODE (Shannon, 1917) §§ 3193a1-3193a3; TEX. COMPLETE STAT. (1928) §§ 4001-4003; VT. GEN. LAWS (1917) §§ 6013-6014; VA. CODE (1930) § 5187; W. VA. REV. CODE (1931) c. 40, art. 2, §§ 1-6; WIS. STAT. (1929) § 241.18-241.21; WYO. COMP. STAT. ANN. (1920) c. 302.

⁴ "This type of statute usually provides that the sale, transfer, or assignment in bulk of the whole or any part of a stock of merchandise, or (in the event of a sale made outside of the ordinary course of trade) of such merchandise and fixtures used in the business—shall be void as against the creditors of the seller or assignor unless certain conditions are complied with. These (conditions) are that a detailed inventory of the stock and its cost price must be made at least five days before the transfer; that the purchaser or assignee must receive from the seller or assignor a sworn statement listing his creditors and the amount owing each; and that the purchaser or assignee must notify these creditors, either personally or by registered mail, at least five days before the transfer, as to the price, terms, and conditions of the proposed sale. Assignments for the benefit of creditors (ordinarily) are exempt from provisions of these statutes, as are sales by judicial and fiduciary officers Any purchaser or assignee who fails to conform to the requirements of the statute, upon the application of any creditor of the seller, becomes a receiver (or trustee) for the creditors and is held accountable to the latter for all merchandise and fixtures which have come into his hands." Billig, *op. cit. supra* n. 1, at 72.

⁵ D. C. ANN. CODE (Torbert, 1924) 325; FLA. GEN. LAWS (Skillman, 1927)

actments after a type of statute called the "Pennsylvania form"⁶ (3) and four states follow a kind of statute which has been termed the "Connecticut form".⁷

In the light of this classification it is of interest (since this article is being published in West Virginia) to set out in part at this point the West Virginia Statute, which in its general structure follows the New York form.⁸

§ 1. When Sale in Bulk of Merchandise or Fixtures
Fraudulent and Void. — The sale in bulk of any part, or the

§§ 5772-5775; GA. ANN. CODE (Michie, 1926 §§ 3226-3229; 2 IDAHO COMP. STAT. (1919) §§ 5752-5756; KY. STAT. (Carroll, 1930) §§ 2651a-1-2651a-7; Acts of La., 1926, 464; 2 MD. ANN. CODE (Bagby, Supp. 1929) art. 83, §§ 100-104; Laws of Mont., 1931, §§ 8607-8610; NEV. REV. LAWS (1912) § 3908; 2 ORE. LAWS (Olson, 1920) §§ 8161-8164; PA. STAT. (West, 1920) §§ 784-791 as amended May 10, 1929, P. L. 1710; Laws of Utah, 1923, c. 92 §§ 1-6.

"The principal provisions of the New York form are included, although ten days notice to creditors instead of five usually are required. In addition the Pennsylvania form sets forth the form of certificate of indebtedness to which the seller must make affidavit. If the act is not complied with the transaction is 'fraudulent and void' rather than 'void'. The purchaser also is required to see that the proceeds of the sale are applied to the debts of the seller. A wilful false statement by the seller to the purchaser is made a misdemeanor. The creditors of the vendor may waive the protection of the act, and a ninety-day limitation is imposed upon those who would take advantage of the statute." Billig, *op. cit. supra* n. 1, at 73.

⁷ See MONTGOMERY, LAWS AND DECISIONS APPLYING TO SALES IN BULK (2d ed. 1926) 13.

The Connecticut bulk sales law (CONN. PUB. ACTS, 1931, c. 234, § 570a) is quite limited in scope. Its provisions include only those vendors who are engaged in the business of buying commodities and selling the same "in small quantities for the purpose of making a profit." Barber shops, dental parlors, restaurants, shoe repair shops, and shoe-shining and hat-cleaning establishments are mentioned specifically as within its requirements. The proposed transfer must be recorded "in the town clerk's office in the town where such vendor conducts such business" at least fourteen days and not more than thirty days before the sale, but no personal notice to the seller's creditors is required. Arizona (ARIZ. REV. CODE, Struckmeyer, 1928, § 2888); California (CAL. CIV. CODE, Ragland, 1927, § 3440, and Washington (Wash. Comp. Stat. Supp. 1927, §§ 5832-5836) all follow along general lines the Connecticut form, although in all three states the operation of the statute is not limited to those buying and selling commodities in small quantities only as in Connecticut. As amended in 1926, the Washington statute also includes some provisions similar to those found in the Pennsylvania statute.

⁸ W. VA. REV. CODE (1931) c. 40, art. 2, §§ 1-6.

The original bulk sales statute of 1909 was held constitutional in *Marlow v. Ringer*, 79 W. Va. 568, 91 S. E. 386 (1917). Lynch, J., who wrote the opinion, said in part, at p. 571: "The necessity for legislation of this character seems to be vindicated fully by the persistent efforts of state legislatures to enact laws restricting sales of merchandise in bulk when not in the ordinary course of trade, except upon compliance with certain conditions prescribed by the various enactments. The earlier attempts to meet the real or preconceived urgency that impelled resort to relief against transactions of this character failed to secure judicial approval. Frequently they were condemned as enactments beyond constitutional authorization or limitation express or implied. The avoidances, however, were met finally and successfully by reenactments

whole, of a stock of goods, wares and merchandise and / or fixtures, pertaining to the conducting of the seller's business, otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller, shall be fraudulent and void as against the creditors of the seller, unless the seller and purchaser shall, at least fifteen days before the sale, make a full detailed inventory, showing the quantity, and so far as possible with the exercise of reasonable diligence, the cost price to the seller, of each article to be included in the sale and the price to be paid therefor; and unless the purchaser demand and receive from the seller a written list of the names and addresses of the creditors of the seller, with the amount of indebtedness due or owing to each, certified by the seller under oath to be a full, accurate and complete list of his creditors, and of his indebtedness, or a statement certified by the seller under oath that he has no creditors; and unless the purchaser shall, at least fifteen days before taking possession of such goods, wares and merchandise and / or fixtures, or paying therefor or giving some note or other evidence of indebtedness therefor, notify personally or by registered mail every creditor whose name and address is stated in such list, or of which he has knowledge, of the proposed sale and stating the aggregate value of the goods, wares and merchandise and / or fixtures, proposed to be sold, as shown by such inventory, and the price, terms and conditions of such sale."

deemed essential to avoid the judgment of organic condemnation pronounced and enforced by the courts, or by eliminating provisions previously held invalid. So that generally these statutes now are upheld as entirely free from constitutional interdiction, although the statutes of Ohio and some other states have not yet obtained the sanction of their appellate courts."

"The Revisers' Note explains that "this section comprises that portion of § 3a, c. 74 Code 1923 which constituted the whole of § 1, c. 78, Acts 1909 The words 'or a statement certified by the seller under oath that he has no creditors' are new, also the words 'or giving some note or other evidence of indebtedness therefor,' taken from § 5187 Code Va. 1919. The concluding portion of the section beginning with the words 'and stating the aggregate value' adopted substantially from § 5187 Code Va. 1919 is new."

Section 2 of Article 2 provides that if the inventory or the list of creditors furnished by the seller or the notice given by the buyer to the creditors "shall in any respect be false or incomplete" with respect to the matters required by Section 1, then "such sale shall prima facie be presumed to be fraudulent and void as against the creditors of such seller, and the burden shall be upon the purchaser to show that he acted in good faith and without any knowledge of such falsity or incompleteness." This section appeared for the first time in the Revised Code of 1931.

Section 3 provides that if the sale is invalid because of failure to comply with the statute then "the goods, wares and merchandise and/or fixtures, in the hands of the purchasers shall be liable to such creditors." If the purchaser has disposed of the goods then he shall be liable to the creditors in an action at law for the value of the goods.

Section 4 requires the seller and the purchaser to preserve the inventory list

The West Virginia Bulk Sales Law was first enacted in 1909,¹⁰ and — as already pointed out — it followed the general lines of what has since become known as the "New York form". However it has been suggested that the statute was derived immediately from the Bulk Sales Law of Massachusetts, whose language it follows.¹¹ As originally framed, the period of notice to creditors was five days instead of fifteen days. The phrase "and / or fixtures pertaining to the conducting of the seller's business" was not included until the Amendment of 1921. This amendment followed the decision of *Lewis, Hubbard & Co. v. Loughran*,¹² which will be discussed presently. It was drafted by A. J. Barnett, Esq., at that time secretary of the Charleston Association of Credit Men, and by Cameron C. Lewis of Lewis, Hubbard & Co. of Charleston¹³ and it encountered no organized opposition on the floor of the Legislature.¹⁴

The Credit Man's Reaction to Bulk Sales Laws

In view of the fact that some writers have questioned the justification of bulk sales statutes,¹⁵ the authors of this paper felt that it would be worth while to obtain opinions as to the usefulness of such legislation and constructive suggestions as to possi-

for six months. After the expiration of that period no suit can be brought attacking the sale.

Section 5 declares that "sellers and purchasers shall include corporations, associations, copartnerships and individuals, but nothing contained in this article shall apply to sales by executors, administrators, receivers, assignees under a voluntary assignment for the benefit of creditors, trustees in bankruptcy, or by any one acting under judicial process."

Section 6 sets out the form of notice which the purchaser is required to furnish the seller's creditors.

¹⁰ Acts of W. Va., 1909, c. 78 § 1.

¹¹ "Our Bulk Sales Law is in identical language with the statute of the State of Massachusetts upon the question, and was evidently taken from the law of that state." Ritz, J., in *Lewis, Hubbard & Co. v. Loughran*, 85 W. Va. 235, 237, 101 S. E. 465 (1919).

¹² *Ibid.*

¹³ Letter to the authors, December 8, 1931, from Ira W. Belcher, Secretary-Treasurer, Charleston Association of Credit Men.

¹⁴ *Ibid.*

¹⁵ "Such diversity of construction (as the courts have placed upon bulk sales statutes) leads to the suspicion that there is little need for remedial statutes of this nature. Before the Federal Bankruptcy Act there was undoubtedly a serious evil. If an insolvent retail dealer could suddenly and secretly sell his stock in bulk, not only was it difficult for his creditors to find out what had been done with the proceeds, but the debtor could often make preferences which the remaining creditors were unable to defeat (citing authorities). But the National Bankruptcy Act obviates both these dangers, by providing for a speedy discovery of assets (§ 7, a. 1 and a. 8) and making a preference by an insolvent debtor an act of bankruptcy (§ 3, a. 2) and voidable (§ 60, a, b). Thus these statutes

ble changes from some of the outstanding credit men of the United States. It is as true now as it was in the early years of the twentieth century — the hey-day of bulk sales laws — that the credit man is the person most vitally concerned with the situation which a bulk sales statute seeks to cover. Thirty years ago the credit men were the enthusiastic proponents of bulk sales laws.¹⁶ Consequently it is of interest to learn how they feel about those statutes now — especially in view of the many changes made in them through judicial interpretation and legislative enactment.

The secretaries of at least two West Virginia credit associations still believe, with reservations, in the efficacy of bulk sales laws. Mr. Ira W. Belcher, secretary-treasurer of the Charleston Association of Credit Men wrote us:¹⁷

“This law is one of the most beneficial laws for the benefit of creditors selling retailers. It prevents, to a great measure, the retailer colluding with some crooked person to defraud those who grant credit. In the old days before we had this law, if a creditor went to his debtor and demanded payment, and the debtor desired to defraud the creditor, he merely said to his creditor: ‘I am no longer connected with this business and am unable to pay you’. And thereupon some relative or friend would produce an unrecorded bill of sale from the debtor, and the creditor had no remedy. This practice has been stopped.”

Mr. U. R. Hoffman, secretary and manager of the Central West Virginia Credit and Adjustment Bureau at Clarksburg, concurs in the opinion expressed by Mr. Belcher. Mr. Hoffman wrote, “The law as it stands today has proven very efficient and appears to be known by more business people than most of our laws.”¹⁸

Both of these credit men, however, made definite criticisms of the West Virginia Bulk Sales Statute and both suggested ways in which it might be improved. Mr. Belcher believes that the law should be broadened to cover other businesses than mercantile es-

are of little use except in cases where the seller is solvent at the time of the sale, or where the purchaser acts bona fide and the seller absconds” (1920) 33 HARV. L. REV. 717, 718.

“It would seem that the remarkable thing about this law is that it does not get anywhere. If the law is violated, the creditor is simply relieved of the burden of proving the sale to be void. If its mandates are obeyed, he gets a notice and may apply his remedy if he has any.” Hunt, *The Bulk Sales Law* (1916) 82 CENT. L. J. 246, 250.

¹⁶ Billig, *op. cit.* n. 1, at 81 *et seq.*

¹⁷ Letter of December 17, 1931.

¹⁸ Letter of December 22, 1931.

tablishments — restaurants, for example.¹⁹ Mr. Hoffman raises several questions in the following paragraphs from his letter.²⁰

“The law . . . is seldom complied with as written for the reason that in order to comply with the law fully it would be necessary to take an inventory of stock, fixtures and equipment and then close the place of business and cease operation for a period of at least 15 days. This part of the law appears to work a handicap on the sale of any business for the reason that, if it is closed for a period of 15 days, in most cases practically all of the trade would be gone and it would be the same as opening a new venture.

“This feature is usually taken care of by taking an inventory, giving the necessary 15 days notice, and then by placing the money derived from the sale in the hands of a third disinterested party to be held in escrow for the benefit of all creditors until such time as the expiration of the required notice when it is distributed, either paying 100 cents on the dollar, or on a pro rata basis.

“Another question which often comes up and which has not been fully settled is whether or not one would be complying with the act by paying one or two creditors the full amount of the purchase price rather than distributing to all creditors on a pro rata basis, presuming, of course, that none has a preference by law.

“Still another question which often comes up is whether or not the purchaser is paying an adequate price for the goods and equipment which he is buying. However, in most cases in which we are interested, this is taken care of by a committee representing creditors, the members of which either assist in the taking of the inventory or investigate the same after it has been taken.”

Several interesting letters were received from credit bureau officials in the neighboring states of Ohio and Pennsylvania. Mr. J. E. Fagan, Secretary of the Credit Association of Central Ohio, with offices in Columbus, believes that the existence of bulk sales legislation is a real help to the creditors of small business establishments which sometimes are transferred without any compliance whatsoever with the Statute.²¹ The larger business establishment involves less of a problem, because in almost every instance the parties consult an attorney and the bulk sales law is complied with strictly.

¹⁹ The reason for this suggestion will appear in the discussion which follows later of *Lewis, Hubbard & Co. v. Loughran*, *supra* n. 11.

²⁰ Letter cited *supra* n. 18.

²¹ Letter to the authors, January 14, 1932.

Mr. Fagan makes the same criticism of the Ohio Statute²² that Mr. Belcher made of the West Virginia Statute, namely, that it is too limited in the type of business covered. Although the Ohio Bulk Sales Law now includes both merchandise and fixtures, the Ohio Court of Appeals, in a test case carried up by the Columbus Association of Credit Men, ruled in 1928²³ that the language of the statute was not broad enough to cover the fixtures of a restaurant transferred without complying with its provisions.²⁴

Mr. Hugh Wells, manager of the adjustment bureau of the Cleveland Association of Credit Men, makes the following frank comment on the Ohio Bulk Sales Law:²⁵

"The Bulk Sales Act of the State of Ohio was placed upon the statute books by the credit men of Ohio. When it first became a law it covered only merchandise, but it was later amended to include furniture and fixtures. The law has effectively instilled into the hearts and minds of the crooks the fear of punishment which might result from the fraudulent transfer of stocks of merchandise in bulk, and has resulted probably in stopping transfers of this nature. It has thus probably protected the credit granting interests to the extent of a large sum of money, but it has acted principally as a sort of policeman who threatens dire trouble if sale are not handled properly.

"As a fact, frankly, the statute in my opinion is somewhat of a failure. The creditor may within the five day period, attack the transfer by garnisheeing the money, or attaching the merchandise, or by asking for a receiver and that the buyer be declared a trustee. The creditor who does not receive notice has, as you know, ninety days time from the date of the sale within which to start a suit asking that the buyer be declared a trustee

"The opinion of (some) lawyers is that the Act is a good bit of a farce; cumbersome; not clearly defined as to rights or remedies; ineffective, and the judges object to it as class legislation. It often works severe hardship on the individual party who buys in good faith, pays a fair consideration but

²² OHIO GEN. CODE, *supra* n. 3.

²³ Monypenny-Hammond Co. v. John Papanagnos and the Nims Realty Company, unreported.

²⁴ Mr. Fagan raises another interesting question in his letter: "I frequently find that creditors are at a loss as to procedure when they do receive a notice in compliance with the Bulk Sales Law, and quite often they call on us after the five-day period has expired, asking what action they should take to protect their rights. There seems to be a general lack of understanding as to their rights when they are notified that a transfer of assets is about to take place, and the creditor is in doubt as to the adequacy of the consideration."

²⁵ Letter to the authors, January 12, 1932.

fails to comply strictly with the requirements of the Act and is forced to endure a law suit, attorney fees and a possible further obligation.

"The Bulk Sales Act could well at this time stand a further study and clarification by amendment for the benefit of all concerned."

Mr. Paul A. Kerin, district manager of the Altoona, Pennsylvania, office of the Credit Association of Western Pennsylvania believes that "the Bulk Sales Law has materially assisted credit men generally in preventing debtors evading their just debts by overnight transfers of their business". "In many instances of my experience in this field of work we have increased returns to creditors through the use of this law", Mr. Kerin wrote.²⁵

General concurrence with the view that bulk sales statutes are helpful to creditors was expressed by Mr. Thomas O. Sheckell, manager of the New York Credit Men's Adjustment Bureau.²⁷ However, Mr. Sheckell believes that the five-day period of notice provided for in the New York Statute (and in the West Virginia Statute, as originally enacted) is not enough time for the creditors to take the steps necessary to protect their interests.

The sale of a debtor's business directly to a purchaser — with the Bulk Sales Law strictly adhered to — rather than a transfer through the medium of an assignee for the benefit of creditors, is a device for settling a debtor's estate which has found favor in some of the adjustment bureaus affiliated with the National Association of Credit Men.²⁸ Mr. Sheckell describes this process as follows:²⁹

"We are using the Bulk Sales Law more and more as a means of carrying into effect an agreed settlement between a debtor and his creditors. Creditors are called together and they appoint a committee. The committee investigates the condition of the debtor's affairs, usually by having an audit and thorough analysis made of the business. They then agree upon what is a fair and reasonable settlement net to the creditors. And, assuming that the debtor was a corporation — which it so frequently is — and that a release is not an important feature, they agree upon a bulk sale to be consum-

²⁵ Letter to the authors, January 23, 1932.

²⁷ Letter to the authors, January 12, 1932.

²⁸ See, for example, *In re Dinger Electric Store*, administered by the adjustment bureau of the Cleveland Association of Credit Men (1928), printed in BILLIG & CAREY, CASES ON THE ADMINISTRATION OF INSOLVENT ESTATES (1932).

²⁹ Letter cited *supra* n. 27.

mated in five days, in compliance in every respect with the Bulk Sales Law. We then distribute pro rata to the creditors their share of the proceeds of the sale.

"In this manner the purchaser takes a good title to the property, creditors have their five days to enjoin the sale if they are not satisfied with the terms and the plan has a tendency of forcing the settlement, in a sense, on the smaller creditors who very frequently would assume an attitude of placing a nuisance value on their small claims."

The Legal Interpretation of Bulk Sales Statutes

The foregoing section presented the views of a group of representative credit men as to the practical utility of bulk sales statutes. If any summary of that section is possible, it might be phrased in some such fashion as this — the credit men, as a class, believe in the efficacy of bulk sales laws, but at the same time they realize that at best these statutes are limited in their application, and that in their present form many of them still require considerable revision.

The remainder of this paper will be devoted to considering some of the problems which the credit men and others have raised and to setting forth the reaction of the courts toward these problems.

Only one generalization, if any, can be drawn safely concerning the attitude of the judiciary toward bulk sales laws. That, as Professor Vold points out in his recently published *Handbook of the Law of Sales*,³⁰ is the fact that a majority of courts thus far have favored strict interpretation of bulk sales statutes.³¹ But even so there is a vigorous and growing minority³² — which in one

³⁰ VOLD, *HANDBOOK OF LAW OF SALES* (1931) 408.

³¹ The authorities are collected *ibid.* n. 21. In some nine cases including *Lewis, Hubbard & Co. v. Loughran*, *supra* n. 11, the courts expressly avow a strict interpretation of bulk sales statutes. In the latter case the Court said, *per Ritz, J.*, at 85 W. Va. 236: "In construing this statute we must bear in mind that it is a restraint to alien property, and must not be extended to include matters not embraced within its terms." The case held that the sale of a lunch wagon, together with the fixtures and supplies, was valid as to creditors of the seller although the seller had not complied with the Bulk Sales Law of West Virginia as then framed. W. VA. CODE ANN. (Barnes, 1923) c. 74, § 3a. In fourteen other cases, including the leading case of *Kasper v. Spokane Merchants' Ass'n.*, 87 Wash. 447, 151 Pac. 800 (1915), the respective courts interpreted the statute strictly with little direct discussion of the point.

³² *Ibid.* n. 22. "Liberality of interpretation was avowed" in at least seven cases. "Liberality of interpretation, at least with regard to certain items, was exemplified without much direct discussion on the point" in four cases, including *Marlow v. Ringer*, *supra* n. 8. In *Marlow v. Ringer* the Supreme Court of Appeals held that the transfer by Ringer, a retail grocery merchant,

instance at least included West Virginia³³ — that advocates the liberal construction of these laws. The reason for this difference of position is not difficult to ascertain. On the one hand we have the tendency shown by some courts to approach the problem of the specific case from the standpoint of the strong common law position of the buyer. As a bulk sales statute is an attack on this position, the court using the "common law approach" will be inclined to employ strict interpretation in order to preserve the common law scheme as far as possible. On the other hand the court which favors a "commercial approach" to legal problems may utilize liberal interpretation in order to extend the rights of the defrauded creditors. However, it is all too easy to place a certain court in a liberal category or in a conservative category, or to allege that it has a "common law approach" or a "commercial approach". The real truth probably lies in the following statement by Professor Vold: "The arguments for strict or for liberal interpretation may on occasion appeal to the court with greater force in one type of case than it does in another, and examples of strict and of liberal interpretation of such statutes under variant facts may readily be found in the same jurisdiction". Certainly this was the situation in West Virginia in the cases of *Marlow v. Ringer*³⁴ and *Lewis, Hubbard & Co. v. Loughran*³⁵ both decided by the Supreme Court of Appeals within a two-year period.

Bearing in mind, then, that judicial interpretation varies with the jurisdiction in question, the statute involved, and the circumstances of the specific case, certain major problems of construction common to the several types of bulk sales laws will now be presented.

Creditors

First of all, just who are included within the term "creditors" as it is employed in a bulk sales statute? In other words, whom

of a half interest in his business and stock of goods to Marlow, in consideration of Marlow's placing in the store a quantity of goods equal in value to the stock then owned by Ringer (altho the parties intended to form a partnership to carry on the business at the same location) constituted a "sale of merchandise in bulk," within the purview of the bulk sales law, "otherwise than in the ordinary course of trade and in the regular and usual prosecution of the seller's business," and, since the provisions of the bulk sales law had not been complied with, the transfer was void *in toto* as against Ringer's creditors.

³³ *Marlow v. Ringer*, *supra* n. 8.

³⁴ *Ibid.*

³⁵ *Supra* n. 11.

does the law seek to protect? The construction usually placed on the word "creditors" is that it includes *all* the creditors of the seller irrespective of class and without regard for the fact that they may or may not be merchandise creditors.⁵⁵ The creditor's claim need not have been reduced to judgment.⁵⁷ Neither need it have arisen out of a transaction involving the goods transferred.⁵⁸ The Supreme Court of Michigan in *People's Savings Bank v. Van Allsburg*⁵⁹ summed up the law on the point in the following manner:

"Section 3 provides that if the purchaser does not comply with the provisions of the Act, upon application of *any* of the creditors he shall become a receiver, etc., and the same section further provides that if he shall conform to the provisions of the law he shall not be liable to *any* of the creditors of the seller. If the legislature intended to restrict the notice to any particular class of creditors, it did not so indicate by the language used. The language made use of is clear and free from ambiguity, and no room is left for the contention that the legislature intended to apply it to any particular class of creditors."

The case contains numerous instances of this tendency to construe liberally the expression "creditors of the seller". In another Michigan decision⁶⁰ the obligee on an appeal bond was held to be a creditor of the surety on the bond, even though the bond had not become absolute through affirmance of the judgment and the obligor's failure to pay. Consequently the obligee was held to be entitled to notice under the Michigan Bulk Sales Law. Other cases illustrating this approach are cited in the footnote.⁶¹

⁵⁵ *Prins v. American Trust Co.*, 169 Ark. 455, 275 S. W. 914 (1925); *Rabalsky v. Levenson*, 221 Mass. 289, 109 N. E. 1050 (1915); *Peoples' Savings Bank v. Van Allsburg*, 165 Mich. 524, 131 N. W. 101 (1911); *Joplin Supply Co. v. Smith*, 182 Mo. App. 212, 167 S. W. 649 (1914); *Touris v. Karantzalis*, 170 App. Div. 42, 156 N. Y. Supp. 526 (1915); *Leon Hersch Corp. v. Goldberg*, 126 Misc. 857, 214 N. Y. Supp. 389 (1926); *Gardner v. Goodner Wholesale Co.*, 247 S. W. 291 (Tex. Civ. App. 1922).

The Bulk Sales Law applies only to claims arising *ex contractu*, and not to unliquidated claims *ex delicto* such as a claim for damages for a personal injury. *Harrison v. Riddell*, 64 Mont. 466, 210 Pac. 460 (1922).

⁵⁷ *Scheve v. Vanderkolk*, 97 Neb. 204, 149 N. W. 401 (1914).

⁵⁸ *Prins v. American Trust Co.*, *supra* n. 36; *Pennell v. Robinson*, 164 N. C. 257, 80 S. E. 417 (1913).

⁵⁹ *Supra* n. 1.

⁶⁰ *Hanna v. Hurley*, 162 Mich. 601, 127 N. W. 710 (1910).

⁶¹ *Galbraith v. Okla. State Bank*, 36 Okla. 807, 130 Pac. 541 (1912); *Mahoney-Jones Co. v. Sams*, 128 Tenn. 207, 159 S. W. 1094 (1913); *Eklund v. Hopkins*, 36 Wash. 179, 78 Pac. 787 (1904). Cf. with *Mahoney-Jones Co. v. Sams* the case of *Whitehouse v. Nelson*, 43 Wash. 174, 86 Pac. 174 (1906).

A few decisions were found which limit rather than expand the meaning of the word "creditors". The Oklahoma case of *Huston v. Alexander Drug Co.*⁴² is an illustration. One King, while indebted to the plaintiff in the sum of \$623.45, sold a stock of drugs in bulk to Woody on May 6, 1912. Woody transferred the stock of goods to defendant, Huston, on June 14, 1912. Both transfers were made without complying with the bulk sales statute.⁴³ The plaintiff brought suit against King and attached the goods in the hands of Huston. The trial court held both transfers void under the statute and sustained the attachment. In reversing the judgment, the Supreme Court of Oklahoma observed, *per Hardy, J.*:⁴⁴

"It appears from the evidence that Woody gave Huston a written bill of sale, in which he recited that there was no indebtedness against the property, and there was other evidence upon this issue. The court found, however, that Huston had knowledge of the claim of plaintiff. Conceding

⁴² 58 Okla. 236, 158 Pac. 892 (1916). *Accord*: Markarian v. Whitmarsh, 78 N. H. 1, 95 Atl. 788 (1915) wherein the court said: "Though the word 'void' is used in the statute, in legal effect it means voidable at the instance of an attaching creditor".

⁴³ The Statute provided: "The transfer of any portion of a stock of goods, wares or merchandise otherwise than in the ordinary course of trade, in the regular and usual prosecution of the transferer's business, or the transfer of an entire such stock in bulk shall be presumed to be fraudulent and void as against the creditors of such transferer."

⁴⁴ *Huston v. Alexander Drug Co.*, *supra* n. 42, at 58 Okla. 238, 239.

As a result of the decision in *Huston v. Alexander Drug Co.*, the Oklahoma Statute, 2 OKLA. COMP. STAT. (1921) §§ 6027-6030, was amended to read as follows: "The transfer of any portion of a stock of goods, wares and merchandise, pertaining to the conducting of said business, otherwise than in ordinary course of trade in the regular and usual prosecution of the transferer's business, or the transfer of an entire such stock in bulk, shall be presumed to be fraudulent and void as against the creditors of such transferer, and such presumption may be rebutted only by the proposed transferee showing that, at least ten days before the transfer, and in good faith, he made a full and explicit inquiry of his transferer, and of all antecedent transferers in sales made within ninety days prior thereto, as to the names and addresses of each and all of his, or their creditors, and that he demanded and received from such transferer or transferers, at least ten days before such transfer, a list of the names and addresses of all the creditors of said transferer or transferers, showing the amount owing each, which statement must be sworn to by such transferer, or transferers, and the oath shall include a declaration that it is a correct list of all of his or their, creditors, with the post office address and the amount owing each; and that, at least ten days before the transfer, the transferee notified or caused to be notified, of such proposed transfer, personally, or by registered mail, each of the creditors of such transferer, or transferers, of whom such transferee had knowledge, or could with the exercise of reasonable diligence, acquire knowledge; and that such purchase was made by him in good faith, for a fair consideration actually paid."

that he did have such knowledge, it would not make the bulk sales law applicable, for if the conveyance from Woody to Huston be void under the law, then a third and fourth conveyance would likewise be void, and any transfer of the stock, not matter how remote in point of time or numbers, would be void so long as plaintiff had a valid claim against its original debtor. We do not think the law should be so construed. It is not the province of the court to legislate, and the language of the act indicates that such transfer is only void as against the creditors of the transferor. The plaintiff was a creditor of King, and not of Woody or of Huston, and the transaction between Woody and Huston would be governed by the general rules of law respecting fraudulent conveyances."⁴⁵

Probably the most difficult problem concerning the creditors arises in the case where the name of one or more creditors is omitted from the list which the seller furnishes the buyer. It often happens that this list is the buyer's only means of knowing the persons to whom the seller is indebted. Consequently the creditor whose name is missing often learns nothing of the transfer until it has been completed, although the buyer may have made an honest effort to notify all of the seller's creditors of whose existence he was aware.⁴⁶ Whether the omitted creditor can regard the transfer as "void" as to him (although valid as to the creditors who have been notified) is a question on which there is some difference of opinion. The Supreme Court of Oregon in *Coach v. Gage*⁴⁷ held that, although the seller failed to include one of his creditors (either intentionally or accidentally) on the list furnished the buyer, nevertheless the omitted creditor could not have the sale set aside if the buyer had acted in good faith and had complied with the statute by notifying all the creditors whose names appeared on the seller's statement. This decision probably states

⁴⁵ "Such statutes do not apply in favor of subsequent creditors whose claims have been incurred after the bulk sale in question, nor in favor of creditors whose claims are barred by the statute of limitations". *Vold, op. cit. supra* n. 30, at 413, citing *Faeth Co. v. Bressie*, 125 Kan. 425, 264 Pac. 1077 (1928); *Kimball v. Cash*, 107 Misc. 363, 176 N. Y. Supp. 541 (1919); *Fisher v. Woodward*, 103 Neb. 253, 170 N. W. 907 (1919).

⁴⁶ The West Virginia Statute, *supra* n. 3, requires the buyer to notify not only all the creditors whose names appear on the list furnished him by the seller, but also all creditors of whom he has knowledge. This provision may enable the court to avoid the result reached in such decisions as *Glantz v. Gardiner*, 40 R. I. 297, 100 Atl. 913 (1917), but it obviously does not provide for the creditor of whose existence the buyer has no knowledge whatever. See *Thompson v. Shaw Motor Co.*, 128 S. C. 171, 122 S. E. 669 (1924).

⁴⁷ 70 Ore. 182, 138 Pac. 847 (1914).

the prevailing view.⁴⁸ On the other hand there are some cases which favor the omitted creditor.⁴⁹ but only one square holding was found in which an omitted creditor was permitted to prevail over a purchaser who had complied literally with the statute and who had acted in entire good faith.⁵⁰

Sellers

In the second place, who are "sellers" within the meaning of the bulk sales laws? The West Virginia statute,⁵¹ which is typical, provides that "the sale in bulk of any part, or the whole, of a stock of goods, wares and merchandise and / or fixtures pertaining to the seller's business otherwise than in the ordinary course of trade and in the regular prosecution of the business of the seller shall be fraudulent and void, *ect.*" Only one West Virginia case was found, *Lewis, Hubbard & Co. v. Loughran*,⁵² which placed any judicial interpretation upon the types of business included within the terms of the foregoing statute. That decision — which will be discussed presently — held that the business of operating a lunch wagon did not come within the purview of the Bulk Sales Law.

The decisions in other jurisdictions reveal various reactions as to who are "sellers" within the meaning of these statutes. In Illinois — where the statute reads⁵³ "the major part or the whole of a stock of merchandise, or merchandise and fixtures or other goods and chattels of the vendor's business otherwise than in the ordinary course of trade" — the courts have held that bulk sales made by farmers were included;⁵⁴ and a sale of all its property

⁴⁸ *Accord*: *Swafford v. Ketchum*, 177 Ark. 1152, 9 S. W. (2d) 806 (1928); *McKelvey v. John Schaap & Sons Drug Co.*, 143 Ark. 477, 220 S. W. 827 (1920); *International Silver Co. v. Hull*, 140 Ga. 10, 78 S. E. 609 (1913); *Glantz v. Gardiner*, *supra* n. 46; *Brecht Co. v. Robinowitz*, 275 S. W. 213 (Tex. Civ. App. 1925) and Note (1926) 4 TEX. L. REV. 260.

⁴⁹ *Linn County Bank v. Davis*, 103 Kan. 672, 175 Pac. 972 (1918); *Lindstrom v. Spicher*, 53 N. D. 195, 205 N. W. 231 (1925); *Oregon Mill & Grain Co. v. Hyde*, 87 Ore. 163, 169 Pac. 791 (1918); *Ritter v. Ray*, 45 Pa. Sup. 440 (1910).

⁵⁰ *Walton v. Walton Fisher Co.*, 146 Miss. 291, 111 So. 364 (1927). The only case found which approximated this situation was *Wilson v. Edwards*, 32 Pa. Sup. Ct. 295 (1907). In that case an omitted creditor was allowed to levy on goods in the hands of a purchaser in bulk. But whether the purchaser notified the other creditors (if there were others) is not brought out in the report of the case.

⁵¹ *Supra* n. 3.

⁵² *Supra* n. 11.

⁵³ ILL. REV. STAT., *supra* n. 3, 2566.

⁵⁴ *Weskainies v. Hesterman*, 288 Ill. 199, 123 N. E. 314 (1919); *Hall v. Main*, 34 F. (2d) 528 (D. C., E. D. Ill. 1929). But see *Spur v. Travis*, 145 Mich. 721, 108 N. W. 1090 (1906).

made by an opera house company, the property consisting of its lease, furniture, fixtures, equipment and good will was held within the purview of the statute.⁵⁵ Also, in at least two jurisdictions,⁵⁶ transfers in bulk by wholesalers, as well as retailers, have been held to fall within the provisions of the bulk sales laws.

On the other hand, these statutes in some jurisdictions have been held inapplicable to a sale in bulk by a manufacturer of his manufactured product,⁵⁷ to the sale of the machinery, other equipment and supplies of a shoe repairing shop,⁵⁸ to a like sale of the equipment of a pool and billiard parlor,⁵⁹ to the sale in bulk of the fixtures and supplies of a restaurant.⁶⁰ Likewise a sale in bulk of an automobile repair shop has been held not within the purview of the statute.⁶¹ Similar holdings have been found in the case of hotels⁶² and livery stables.⁶³ And sales by auctioneers at public auction have been held not to be within the statutes.⁶⁴

⁵⁵ *LaSalle Opera House Co. v. LaSalle Amusement Co.*, 289 Ill. 194, 124 N. E. 454 (1919).

⁵⁶ *North American Prov. Co. v. Fischer Lime Co.*, 168 Ark. 106, 269 S. W. 993 (1925); *Root Refineries v. Gay Oil Co.*, 171 Ark. 129, 284 S. W. 26 (1926); *Niklaus v. Lessenhop*, 99 Neb. 803, 157 N. W. 1019 (1916). In *North American Prov. Co. v. Fisher Lime Co.*, the court said at p. 112:

"Now it will be seen that the language of the act in its common and usual acceptation includes wholesale and retail merchants alike. The language is sufficiently comprehensive to show that the object of the act was not only to protect wholesale merchants against fraudulent sales by retail merchants, but also to protect manufacturers and wholesale merchants against fraudulent sales by wholesale merchants."

⁵⁷ *Conn. Steam Brown Stone Co. v. Lewis*, 86 Conn. 386, 85 Atl. 534 (1912); *Cooney, Eckstein & Co. v. Sweat*, 133 Ga. 511, 66 S. E. 257 (1909); *Gitt v. Hoke*, 301 Pa. 31, 151 Atl. 585 (1930); *Nichols, North Buse Co. v. Belgium Cannery*, 188 Wis. 115, 205 N. W. 804 (1925).

⁵⁸ *Swanson v. Devine*, 49 Utah 1, 160 Pac. 872 (1916).

⁵⁹ *Independent Breweries Co. v. Lawton*, 200 Mo. App. 238, 204 S. W. 730 (1918); *Ferrat v. Adamson*, 53 Mont. 172, 163 Pac. 112 (1917).

⁶⁰ *D. C. Goff Co. v. First State Bank of De Queen*, 175 Ark. 158, 298 S. W. 884 (1927); *Johnson v. Kelly*, 32 N. D. 116, 155 N. W. 683 (1915); *Swift & Co. v. Tempelos*, 178 N. C. 487, 101 S. E. 8 (1919); *Lewis Hubbard & Co. v. Loughran*, *supra* n. 11. See Annotation, *Applicability of Bulk Sales Act to Hotel, Restaurant, Boarding House, Saloon, Pool Hall, or Livery Stable*, (1920) 7 A. L. R. 1537, (1928) 54 A. L. R. 1537.

⁶¹ *Fisk Rubber Co. v. Hinson Auto Co.*, 168 Ark. 418, 270 S. W. 605 (1925).

⁶² *Stewart v. Sulger*, 174 App. Div. 838, 161 N. Y. Supp. 489 (1916).

⁶³ *Everett Produce Co. v. Smith Bros.*, 40 Wash. 566, 82 Pac. 905 (1905); *Balter C. Miller v. Crum*, 199 Mo. App. 380, 203 S. W. 506 (1918).

⁶⁴ *Schwartz v. King Realty Co.*, 93 N. J. L. 111, 107 Atl. 154 (1919); *aff'd.*, 94 N. J. L. 134, 109 Atl. 567 (1920). The bulk sales statutes of Kentucky and Pennsylvania include specifically sales by auctioneers. The Illinois statute excludes sales by auctioneers when made in good faith after proper notice of the sale has been given by publication or posting.

Property

In the third place to what property does a bulk sales law apply? How strictly is the phrase "a stock of goods, wares and merchandise" interpreted? Does it, for instance, include the fixtures of the business in those states where the statute contains no express reference to fixtures? On this question there has been considerable disagreement. Some decisions have held that fixtures were included by implication⁶⁵ in the phrase "a stock of goods, wares and merchandise". Other cases have reached an opposite result.⁶⁶

West Virginia took the latter view in *Lewis, Hubbard & Co. v. Loughran*⁶⁷ previously mentioned. In 1919, when this case was decided, the statute⁶⁸ provided that "the sale in bulk of any part of the whole of a stock of merchandise otherwise than in the ordinary course of trade . . . shall be fraudulent and void as against the creditors of the seller." In the *Loughran* case the owner of a lunch wagon in Charleston, while indebted to the plaintiff for supplies, sold the wagon, furniture, fixtures, appliances and stock of supplies to one Reilley for \$1000 cash. The sale occurred on July 27, 1918 and about a month later the plaintiff sued the seller in the Intermediate Court of Kanawha County and attached the lunch wagon and its equipment in Reilley's possession. Reilley petitioned for the release of the property from the attachment. Plaintiff defended on the ground that the sale was void as to him, a creditor, because of the seller's failure to comply with the requirements of the Bulk Sales Law. The Intermediate Court held the transfer within the statute and ordered a sale of the property in order to satisfy plaintiff's claim. The Circuit Court of Kanawha County reversed the judgment and was affirmed by the Supreme Court of Appeals. After reviewing the authorities, Ritz, J. said in the final paragraph of the court's opinion:⁶⁹

"What was the purpose of the Legislature in passing this Act? Evidently to preserve for those engaged in the whole-

⁶⁵ *Parham & Co. v. Potts-Thompson Liquor Co.*, 127 Ga. 303, 56 S. E. 460 (1907); *Walton v. Walton Fisher Co.*, *supra* n. 50.

⁶⁶ See, for example, *Heilmann v. Powelson*, 101 Misc. 230, 167 N. Y. Supp. 662 (1917). *Smith v. Boyer*, 119 S. C. 176, 112 S. E. 71 (1921). As to the unsuccessful attempt of the Tennessee Legislature to amend the Bulk Sales Law to include fixtures, see *Henderson Co. v. Breeden Bros.*, 148 Tenn. 278, 255 S. W. 359 (1923).

⁶⁷ *Supra* n. 11.

⁶⁸ W. VA. CODE ANN. (Barnes, 1931) c 74, § 3a.

⁶⁹ 85 W. Va. 240.

sale mercantile business, as security for the payment of their debts for merchandise, the merchandise itself, unless the same was sold in the ordinary course of trade. The language 'stock of merchandise, or any part thereof,' was never intended to include the furniture, fixtures and appliances necessarily employed in the conduct of the business, for the very good reason that they are not sold by such merchants in the ordinary course of their business at all, and by its terms the act only applies to such merchandise as is sold in the ordinary and usual conduct of the business. One running a lunch wagon, as was the defendant in this case, cannot be said to keep any stock of merchandise at all for sale. His business is not buying and selling merchandise within the meaning of this Act, and we are persuaded that it was never the legislative intent that it should apply to a business of this character."

In 1921 the West Virginia Legislature amended the Bulk Sales Law in such a manner as to give a creditor further protection than the court was inclined to accord him in *Lewis, Hubbard & Co. v. Loughran*. To the phrase "stock of goods, wares and merchandise" was added "and for fixtures pertaining to the conducting of the seller's business".⁷⁰ Thus the word "fixtures" became part of the statute. But just *what* are "fixtures"?

The courts in several other jurisdictions have ruled on the question. It has been held in Michigan, for instance, in the leading case of *Bowen v. Quigley*⁷¹ that the "fixtures" of a coal business do not include horses, wagons, harness, coal bags and coal chutes. And in the same jurisdiction the vehicles, harness, caskets and appliances of an undertaker were declared not to be "fixtures".⁷² On the other hand, "in Washington and Georgia, where the statutes do not specifically cover fixtures, nevertheless the merchandise and 'fixtures' (including pool tables and the like) of a saloon were held to be within the Bulk Sales Laws."⁷³ The Michigan Court in *Bowen v. Quigley*⁷⁴ formulated the following definition of "fixtures":

"Inasmuch as this law is aimed at the business of merchants, we think the word 'fixtures' as used in the statute, must have reference to such chattels as merchants usually possess and annex to the premises occupied by them, to enable

⁷⁰ Acts of W. Va., 1921, c. 108.

⁷¹ 165 Mich. 337, 130 N. W. 690 (1911).

⁷² People's Savings Bank v. Van Allsburg, *supra* n. 36.

⁷³ Montgomery, *op. cit. supra* n. 7, at 28, citing Parham v. Potts-Thompson Co., 127 Ga. 303, 56 S. E. 460 (1907); Seattle Brewing Co. v. Donofris, 34 Wash. 18, 74 Pac. 823 (1904).

⁷⁴ *Supra* n. 71, at 339.

them the better to store, handle and display their goods and wares. Such chattels when annexed to the premises become fixtures. They are generally removed without material injury to the premises at or before the end of the tenancy. They are sometimes called trade fixtures.

And, in explaining why it did not expand the term "fixtures" to include the horses, wagons, coal bags, *etc.*, the Court added:⁷⁵

"It is suggested that by reason of the words 'pertaining to the conducting of said business' the statute should be given a broader meaning than it otherwise would be given, and be made to include the furniture, tools, vehicles and appliances which were used in and about the conducting of the coal business. We are not persuaded that the legislature has indicated by the language made use of that it intended the word 'fixtures' should have any other or different meaning than is usually given to it in the relation of landlord and tenant. It is probably true that the act could be made more effective if we were to give the word 'fixtures' the enlarged meaning claimed for it, but we do not feel that the language of the statute will justify us in so doing. If the legislature has stopped short of making it an effective act, it is not the business of this court to furnish the legislation by construction".

In 1921 the Virginia Legislature took steps to make their bulk sales law a more "effective Act" by adding not only "fixtures" but also "other trade assets" to the phrase "any part or the whole of a stock of merchandise".⁷⁶ It was the purpose of this Amendment to cover such a situation as that arising in *Bowen v. Quigley*. However, the "effective" measure was short lived. It was struck out of the statute by another amendment in 1930.

So much, then, concerning what constitutes "fixtures", and the rather unsettled state of the authorities. How broad is the general phrase "goods, wares, and merchandise" apart from the question of fixtures, if any such departure can be made? Some courts, in their attempt to generalize, say that the phrase means "goods and merchandise employed in trade, which in the ordinary course of trade, and in the regular and usual prosecution of the seller's business, would be sold or bartered otherwise than by a sale in bulk".⁷⁷ Consequently it has been held that the following articles were not in the protected category of "goods, wares,

⁷⁵ *Ibid.*

⁷⁶ VA. CODE ANN. (1919) § 5187 as amended by Laws of 1926.

⁷⁷ Rice, J., in *Wilson v. Edwards*, *supra* n. 50 at 302. Similar expressions are found in *People's Savings Bank v. Van Allsburg*, *supra* n. 36 and in *Smith v. Boyer*, *supra* n. 66.

and merchandise": a cash register used in a saloon which dispensed liquors and cigars;⁷⁸ the spare parts found in an automobile repair shop;⁷⁹ the food, utensils, and equipment in a restaurant;⁸⁰ two boats, a barge, rock crushers, and piles of rock employed in construction work.⁸¹ But, to the contrary, in an Illinois case⁸² the broad Bulk Sales Law of that jurisdiction⁸³ was applied to the transfer of the cattle, horses, and tools used by a dairyman who sold milk at retail.

Conclusions

The factors just discussed under the divisions of creditors, sellers, and property constitute some of the more important problems encountered in the operation of bulk sales laws. Others exist which will be presented and discussed in a later article, as, for example, (1) what transactions (chattel mortgages, assignments for the benefit of creditors, *etc.*) fall within the scope of bulk sales statutes; (2) what is the meaning of the phrase "presumed to be fraudulent and void" when used in a bulk sales law; (3) what remedies are open to the creditors where the debtor sells out in bulk without complying with the terms of the statute?

As suggested at the beginning of this paper, it was not intended to incorporate herein the authors' conclusions regarding any of the statutory problems growing out of bulk sales legislation. These conclusions will be reserved until the additional aspects of bulk sales laws noted above have been considered in the next article of the series.

⁷⁸ *Albrecht v. Cudihee*, 37 Wash. 206, 79 Pac. 628 (1905).

⁷⁹ *Fisk Rubber Co. v. Hinson Auto Co.*, *supra* n. 61.

⁸⁰ *Johnson v. Kelly*, 32 N. D. 116, 155 N. W. 683 (1915); *Swift & Co. v. Tempelos*, *supra* n. 60.

⁸¹ *Atlas Rock Co. v. Miami Supply Co.*, 89 Fla. 340, 103 So. 615 (1915).

⁸² *Larson v. Judd*, 200 Ill. App. 420 (1916).

⁸³ ILL. REV. STAT., *supra* n. 3, renders fraudulent and void "the sale, transfer, or assignment in bulk of the major part or the whole of a stock of merchandise, or merchandise and fixtures or other goods and chattels of the vendor's business otherwise than in the ordinary course of trade and in the regular and usual prosecution of the vendor's business."